Supreme Court, U.S.
FILED
APR 3 2003
CLERK

No. 02-575

IN THE
Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ of Certiorari
to the California Supreme Court

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

ALAN B. MORRISON
Counsel of Record
ALLISON M. ZIEVE
MARKA PETERSON
SCOTT L. NELSON
DAVID C. VLADECK
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Amicus Curiae
Public Citizen

April 2003

BEST AVAILABLE COPY

3244

QUESTIONS PRESENTED

Although not included by Petitioner in its questions presented, this case presents a substantial jurisdictional question. That question is as follows:

> In this case, where there is no final judgment, does the Court have jurisdiction pursuant to the fourth exception in *Cox Broadcasting* to do any more than determine whether one or more of the statements alleged to be actionable in the complaint is not protected from suit under the First Amendment, as asserted by Petitioner?

Amicus believes the first question presented in the petition is more properly stated as follows:

> Does the First Amendment immunize a company from a lawsuit alleging that the company made specific false factual representations, as part of a campaign to persuade consumers that its labor practices were lawful and proper, merely because those practices are also the subject of public controversy?

Amicus believes that the proper answer to the jurisdictional question requires dismissal of Petitioner's second question presented.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

BACKGROUND 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. THIS COURT HAS JURISDICTION ONLY TO DECIDE WHETHER THE FIRST AMENDMENT ISSUE RAISED AND DECIDED BELOW DISPOSES OF THIS CASE 7

II. NIKE MAY BE SUED FOR FALSE OR MISLEADING FACTUAL REPRESENTATIONS DIRECTED AT CONSUMERS ABOUT ITS LABOR PRACTICES 13

A. Respondent's Suit Targets Specific Factual Assertions Directed at Consumers 15

B. The First Amendment Does Not Protect False Marketing Statements Simply Because They Relate To Controversial Topics 19

CONCLUSION 26

TABLE OF AUTHORITIES

CASES Page

Abney v. United States,
431 U.S. 651 (1977) 11

Bates v. State Bar of Florida,
433 U.S. 350 (1977) 14, 21

Board of Trustees of State University of New York v. Fox,
492 U.S. 469 (1989) 21

Bolger v. Youngs Drug Products Corp.,
463 U.S. 60 (1983) 15, 21, 22

Central Hudson Gas & Electrical Corp. v. Public Service Comm'n,
447 U.S. 557 (1980) 14, 21

Christopher v. Harbury,
536 U.S. 403 (2002) 13

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 8

Edenfield v. Fane,
507 U.S. 761 (1993) 1, 18

Florida Bar v. Went For It, Inc.,
515 U.S. 618 (1995) 18

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 14, 21

Jefferson v. City of Tarrant,
522 U.S. 75 (1997) 13

Korea Supply Co. v. Lockheed Martin Corp.,
29 Cal. 4th 1134 (2003) 12

Lorillard v. Reilly,
533 U.S. 525 (2001) 21

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 25

Ohralik v. Ohio State Bar Ass'n,
436 U.S. 447 (1978) 23

Pierce County v. Guillen,
123 S. Ct. 720 (2003) 11

Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,
478 U.S. 328 (1986) 21

Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995) 18

Swint v. Chambers County Commission,
514 U.S. 35 (1995) 9

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,
425 U.S. 748 (1976) 1, 14, 18, 21

Zauderer v. Office of Disciplinary Counsel,
471 U.S. 626 (1985) 1, 21

STATUTES AND REGULATIONS

California Business & Professions Code § 17200 4

Cal. Code of Civil Procedure § 425.16 25

Rule of the Supreme Court of the United States 14.1(i) .. 11

28 U.S.C. § 1257(a) 7

62 Fed. Reg. 63756 (1997) 22

MISCELLANEOUS

K. Cottril, *Global Codes of Conduct*, J. Bus. Strategy,
May 1, 1996 19

M.M. Hossain, *Emerging Markets Database: The Debate on Labor Standards,*
The Independent, April 2, 2000 20

N. Morris, *Saving The Brand Name*, MacClean's,
Dec. 11, 1995 20

M. Scott, *Can Consumers Change Corporations?,*
Executive Female, May 15, 1996 20

R. Stern, *et al.*, *Supreme Court Practice* (8th ed. 2002) .. 12

Sourcing: Cheap v. Ethical, J. Am. Chamber
Com. in Hong Kong, Sept. 1, 1997 ..... 19, 20

INTEREST OF AMICUS CURIAE[1]

Public Citizen is a non-profit advocacy organization, with over 125,000 members nationwide and three offices, including one in California. Since its founding in 1971, Public Citizen has been active before Congress, regulatory agencies, and the courts in matters relating to consumer protection, among other things. Public Citizen has been in the vanguard in pressing for the extension of First Amendment protection to truthful commercial speech. For example, Public Citizen's attorneys represented the consumer plaintiffs in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), the first case to recognize that commercial speech is entitled to significant protection under the First Amendment. Amicus' counsel have also represented parties seeking to invalidate commercial speech restraints in other cases, including *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and *Edenfield v. Fane*, 507 U.S. 761 (1993), and Public Citizen has filed amicus briefs in numerous other cases before this Court involving commercial speech issues.

Although the interests of Public Citizen members and other consumers are served by truthful commercial speech, consumer interests are not served by marketing campaigns that seek to influence consumer choice through false or misleading statements. Such false marketing speech has no First Amendment value, and Public Citizen is concerned that the

---

[1] Pursuant to Rule 37.6 of this Court, amicus curiae states that no party had any role in writing this brief and that no one other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from both parties consenting to all amicus briefs are on file with the Clerk.

legitimate concerns that gave rise to the protection of commercial speech not become a cloak for marketing abuses.

Public Citizen submits this brief for two reasons. First, whereas Nike presents the challenged speech as a unified whole, without differentiating among the individual statements at issue, our brief highlights that at least some of the statements are specific, verifiable representations of fact intended to promote Nike's products to consumers as "labor friendly." These statements are indistinguishable from statements this Court has found to constitute commercial speech, and the Court should reaffirm that speech designed to induce consumers to purchase products may, if false or misleading, give rise to liability. Second, we file this brief to address the jurisdictional limitations of the Court's consideration of this case, an issue that Petitioner's merits brief does not discuss. Although the ultimate resolution of the First Amendment issues may not be the same for each statement, this Court should not attempt to resolve all of those issues at this time, for both jurisdictional and prudential reasons. Distinct from the other briefs in this case, our brief argues that the Court should make no further rulings in the case once it has identified at least one allegedly false commercial message that can serve as the basis for continuing this litigation in the California courts.

BACKGROUND

Petitioner Nike promotes its sports shoes, clothing, and equipment largely based on its brand identity. Its market success is thus closely tied to its corporate image. *See* First Am. Compl., Exh. A at 367 (Pet. Lodg. at 42) (1997 Annual Report) ("we are a company . . . that is based on a brand, one with a genuine and distinct personality, and tangible, emotional connections to consumers the world over").

In 1992, in the face of intense public criticism about conditions at its overseas factories, Nike initiated a public relations campaign to promote itself as labor-friendly. Nike adopted a "code of conduct" that it promised would guide its selection of and standards for the subcontractors who manufacture its shoes and apparel. *Id.* at ¶26, Exh. U. In addition, Nike adopted a monitoring system under which its subcontractors are required to sign a "Memorandum of Understanding" certifying that they are complying with a set of specific standards. *Id.*, Exh. V at 534-35 (Pet. Lodg. 206-07). Those standards include compliance with local minimum wage, overtime, health and safety, and other workplace laws, adherence to local environmental laws, and a promise not to use forced or child labor. *Id.*, Exh. V at 535 (Pet. Lodg. at 207). After adopting its code and monitoring system, Nike frequently issued public statements making factual claims about policies and practices affecting workers at its overseas factories. *See, e.g.*, *id.* at ¶28, Exhs. P, V, Z.

College athletic departments are among Nike's most important market constituents. In addition to being customers, more than 200 colleges and universities have promotional contracts with Nike under which they agree that their teams will use and endorse Nike products. *Id.* at ¶14. Accordingly, as part of its campaign to present itself as labor-friendly, Nike's Director of Sports Marketing sent a letter in June 1996 to the presidents and athletic directors of more than 200 colleges and universities. Among other things, the letter labeled "completely false" charges that "child labor is used in the production of [Nike] goods," and stated that Nike subcontractors comply with the labor requirements set forth in its Memorandum of Understanding "in all material respects." *Id.*, Exh. R.

In December 1996, as a further part of Nike's public relations campaign, Nike sent a letter to the *San Francisco Examiner* stating that Nike knows "consumers are savvy and want to know they support companies with good products and practices," and that "[d]uring the shopping season, we encourage shoppers to remember" that Nike is a leader in improving factory conditions. The letter went on to state that a recent study showed that Nike workers were able to devote 43 to 47 percent of their wages to savings or discretionary spending. *Id.*, Exh. S.

Another Nike document, entitled "Please, consider this . . .," *id.*, Exh. P, explained that "we'd like to share our perspective [about Nike labor practices] with you." Among other things, Nike stated: "No kids produce NIKE shoes and apparel," and "Nike pays on average, double the government-mandated minimum wage in the countries where our footwear is produced. "

In keeping with these efforts to promote itself as a labor-friendly company, in February 1997, Nike announced that it had commissioned former United Nations Ambassador Andrew Young and his organization Goodworks International to investigate and report on labor practices at Nike's overseas facilities. The Goodworks report concluded that Nike was generally doing a good job enforcing its code and improving workers' lives, *id.*, Exh. EE, and Nike took out full-page ads in five national newspapers quoting that conclusion. *Id.*, Exh. FF.

In 1998, respondent Marc Kasky sued Nike in state court. The complaint alleged that many of Nike's statements about its labor practices were false or misleading and sought relief under California Business and Professions Code section 17200 *et seq.*, which prohibits unfair competition, false

advertising, and consumer fraud and deception. Rather than answering the complaint, Nike demurred, asserting, among other things, that it would violate the First Amendment to apply section 17200 to *any* of Nike's statements about its labor practices. The superior court sustained Nike's demurrer on First Amendment grounds and dismissed the complaint with prejudice. Pet. App. at 80a. The court of appeal affirmed on the same ground. *Id.* at 66a. In so doing, it expressly declined to address any other issue. *Id.* at 66a, 70a. The California Supreme Court reversed in an opinion that addressed only Nike's First Amendment argument that none of its statements were actionable under section 17200, and it remanded the case for further proceedings. *Id.* at 1a.

SUMMARY OF ARGUMENT

The case before this Court properly presents one substantive question within the Court's jurisdiction: whether a company that makes specific, verifiable representations about its labor practices, as part of a campaign to promote its products to consumers as "labor-friendly," is protected from suit for false or misleading statements merely because the representations concern a matter of public controversy. The answer to that question is no.

Because this case was dismissed in the lower state courts (and then reinstated by the California Supreme Court) solely on the issue whether the First Amendment provides Nike a complete defense for every statement it made about its labor practices, the case lacks not only a final judgment, but also any record showing how California law would apply to the multitude of statements identified by Kasky. Going beyond the threshold question whether the First Amendment insulates Nike from liability to reach the numerous issues of statutory and

constitutional interpretation raised by Nike would violate the final judgment rule and involve the Court in deciding, without the benefit of a record, issues that were neither raised nor decided in the state courts below. Accordingly, once this Court determines whether any *single* factual representation by Nike may be subject to suit consistent with the First Amendment, it should remand the case to the California Supreme Court.

As to the sole question properly before the Court, this Court has long recognized that the First Amendment does not protect businesses from liability for false or misleading factual statements that are directed at consumers and relate to matters that affect consumer choices in the marketplace. Because Nike has made at least one specific, purely factual claim about its labor practices, and because that claim was made to consumers for the purpose of promoting Nike sales, Nike can be held accountable for that representation (if it is shown to be false or misleading) without running afoul of the First Amendment. As the Solicitor General acknowledges, the First Amendment would not be a defense if a government agency—federal or state—brought an action based on such statements. Likewise, it is not a defense in this private attorney general action.

Nike's promotional speech about its labor practices is commercial in the most important sense. Labor practices, as with other intangible aspects of products, are an established basis of consumer choice. To hold that companies have a First Amendment right to misrepresent facts about this subject to consumers, but not to misrepresent other matters that affect purchasing decisions, would be to infringe on consumer choice in exactly the way the First Amendment deems illegitimate.

The fact that a company's products or practices have become controversial does not transform factual representations

about those matters into non-promotional or political speech. This Court has long recognized that commercial speech receives intermediate protection because it is important to consumers. In that sense, all commercial speech involves matters of "public concern," to use Nike's phrase. Affording protection to false or misleading commercial speech would not only be unjustified under the First Amendment, it would undermine the very public interests that support protecting truthful commercial speech.

Accordingly, for the same reasons that other false or misleading commercial speech receives no First Amendment protection—and can be prohibited to the extent that it is both purely factual and false or misleading—Nike's factual representations to consumers about its labor practices are not immune from suit here. The Court should therefore affirm the decision below and remand the case for discovery and trial.

ARGUMENT

I. THIS COURT HAS JURISDICTION ONLY TO DECIDE WHETHER THE FIRST AMENDMENT ISSUE RAISED AND DECIDED BELOW DISPOSES OF THIS CASE.

Nike asserts that this Court has jurisdiction over this case under 28 U.S.C. § 1257(a), which confers jurisdiction over "final judgments or decrees rendered by the highest court of a State." Because no final judgment has been entered in the case, Nike has the burden of showing that some exception to the final judgment rule applies.

This Court has identified four categories of cases that constitute exceptions to section 1257(a)'s finality requirement. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-87 (1975). Nike relies on the fourth exception, Reply on Pet. for Cert. at 4, which has two requirements. First, the state court judgment must represent the final word within the state court system on a federal issue, "with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, *and* where reversal of the state court on the federal issue would be *preclusive* of any further litigation on the relevant cause of action." *Id.* at 482-83 (emphasis added). Second, "a refusal immediately to review the state-court decision" must present a risk of "seriously erod[ing] federal policy." *Id.*

1. Although the question is not free from doubt, we agree that the fourth exception is applicable to the first question presented to the extent that Nike can show that its First Amendment defense is dispositive of the entire case and that the failure of this Court to decide the issue now would seriously erode federal values underlying that defense.

Nike cannot make that showing, and in fact makes no effort to do so. As discussed in Point II below, some of the statements at issue are purely factual, readily subject to verification by Nike, fully capable of being proven true or false in a court of law, and integrally related to Nike's efforts to market its products. If the Court agrees that even *one* of those statements is actionable, the case will go forward. Because the fourth *Cox Broadcasting* exception applies only insofar as resolution of the issue would dispose of an entire cause of action, not just some aspects of it, the Court will lack jurisdiction at that point to further consider the issues raised in

Petitioner's brief. *Cf. Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51 (1995) (pendent appellate jurisdiction over non-final issues proper, if at all, only where such issues are "inextricably intertwined" with appealable issues).

Even if this Court has jurisdiction to address the applicability of the First Amendment to each factual assertion made in the complaint, it should exercise its discretion, as it would on a petition for a writ of certiorari, to decline to pass on the applicability of Nike's First Amendment defense with regard to each and every statement. Nike has never attempted to show that each statement alleged to be actionable is protected by the First Amendment. Rather, Nike has litigated this case on an all-or-nothing basis. This Court need not and should not take on the burden of sorting through the statements to determine which are actionable and which are not.[2]

The fact that this case is still in its state-court infancy further counsels against this Court ruling on each statement. Nike has not yet filed an answer, let alone participated in discovery or a trial, or obtained a decision from any California court as to whether any particular statement is true, false, misleading, or deceptive. Moreover, in many instances, the complaint alleges that Nike made a particular false or misleading statement without describing the context in which it was made. *See, e.g.* First Am. Compl. ¶28 (quoting Nike

---

[2] Although this Court should not go through the allegedly false statements one by one to see which survive a First Amendment challenge on their face, the California courts can and should perform that task if this Court's discussion of the applicable legal standards differs from that of the California Supreme Court.

document entitled "The Nike Code of Conduct: What it is, How it Works"). Indeed, Nike's brief (at 26-27) makes much of Respondent's failure to consider the context of the speech. *See also* US Br. 27 (cautioning against addressing "commercial speech issue in this abstract context"). The obvious importance of context in deciding whether a given statement can give rise to liability provides an additional reason why the Court should halt its consideration as soon as it determines that at least one statement is actionable.

The Court's limited role in this case at this juncture does not mean that—in the course of explaining why the First Amendment does not bar all of Respondent's claims as to false or misleading statements that are specific, factual, and made to induce consumers to buy Nike products—the Court cannot contrast those statements with other statements that would, in all likelihood, not be actionable (for example, that Nike is a "moral company"). Thus, the Court can give additional guidance without attempting to resolve the constitutional viability of every allegation.

2. The second question presented by Petitioner poses even more troublesome jurisdictional problems. Most of Nike's discussion of the second question is directed to what it contends are unconstitutional burdens imposed by California law, including the use of what Nike terms "strict liability," the possibility that damages might be imposed for Nike conduct outside of California, the absence of a heightened standard of proof, and the possibility of court-imposed disgorgement of profits to an uninjured plaintiff.

This set of issues has two unifying features. First, with one exception, discussed *infra* at 12, none of the issues is dispositive of the case as a whole, although rulings in Nike's

favor might ease Nike's burdens on remand. For example, if the Court were to conclude that Kasky must show more than strict liability to prevail, that holding might make this case more difficult for him to win but would not end the litigation. Such issues do not fall within the fourth exception to *Cox Broadcasting*. And the fact that the first question presented arguably falls within a *Cox Broadcasting* exception does not affect the Court's jurisdiction over the second question. *See Pierce County v. Guillen*, 123 S. Ct. 720, 728-29 (2003) (where one portion of case fell within *Cox Broadcasting* exception and another portion did not, Court had jurisdiction only to decide former); *cf. Abney v. United States*, 431 U.S. 651, 662-63 (1977) (where one issue appealable under collateral order doctrine, other issues *not* immediately appealable unless they independently fall within exception to final judgment rule).

Second, Nike did not present any of these issues to the California Supreme Court, and that court passed on none of them. As stated in Nike's merits brief in this Court (at 14), the only issue before the California Supreme Court was whether Nike's false statements about working conditions at its own facilities meet the test for commercial speech. That issue is Nike's first question in this Court. Rule 14.1(i) of the Rules of this Court makes clear that when a case comes from a state court, the petitioner must show that the "federal questions sought to be reviewed were raised" below and how they were "passed on." Nike has made no such showing here because Nike did *not* raise the issues contained in the second question in the court below and the issues were *not* considered by that court.[3] *See* Pet. App. at 1a, *see also id.* at 66a, 70a. Therefore,

---

[3] That some of these issues were noted in passing by the (continued...)

even if the final judgment rule were not a barrier to the Court's review of these objections, Nike's failure to raise them below precludes their consideration now.

The only potentially case-dispositive issue presented as part of Nike's second question is the argument that the First Amendment does not permit a "private attorney general" action unless it is brought by a plaintiff claiming personally to have suffered harm. Although this issue arguably would satisfy the fourth *Cox Broadcasting* exception, it is not before the Court because it was not raised or decided below. *See* Rule 14.1(i). Furthermore, Nike is asking this Court to declare a state statute to be unconstitutional, at least on an as-applied basis, with no factual record and no opportunity by the state courts to consider the issue. In fact, the California Supreme Court's recent decision in *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003), indicates that California law does not permit disgorgement of profits as a remedy to a plaintiff who suffered no injury. Even if the Court has jurisdiction to consider the issue, it should exercise its discretion to decline to do so in the absence of a full record and meaningful consideration by the California courts.[4]

---

[3](...continued)
dissent satisfies neither the requirement that the petitioner have presented them below nor the requirement that the court below have decided the issue. *See* R. Stern, *et al.*, *Supreme Court Practice* § 3.19 at 186 (8th ed. 2002).

[4] Moreover, the issue is not independently worthy of review, especially in the context of this case. Even if Nike and the Solicitor General were correct that a proper plaintiff in this case must allege that he purchased a Nike product and show (continued...)

Therefore, this Court has jurisdiction to decide, and in any event should decide, *only* whether there is at least one allegedly actionable statement that is not barred by Nike's First Amendment defense. As discussed below, several statements readily meet that standard. The remaining issues, "still sub judice in [California], [were] brought to this Court too soon." *Jefferson v. City of Tarrant*, 522 U.S. 75, 77 (1997). Accordingly, the case should be remanded to the California courts to decide the remaining issues presented in this case.

II. NIKE MAY BE SUED FOR FALSE OR MISLEADING FACTUAL REPRESENTATIONS DIRECTED AT CONSUMERS ABOUT ITS LABOR PRACTICES.

Nike has made a number of specific, purely factual assertions to its customers about its labor practices. At this stage in the litigation, the Court must accept as true Kasky's allegation that these factual statements were false. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). Thus, Nike is claiming a right to disseminate false information to consumers about its manufacturing practices. Nike's argument is flatly at odds with the consumer and public interests that form the basis of the protection afforded *truthful* commercial speech. The First Amendment has never afforded the protection that Nike seeks.

---

[4](...continued)
detrimental reliance on Nike's false statements, this litigation would not end. Kasky's counsel could amend the complaint to add such an allegation or to add one of the thousands of California consumers who could make such a claim.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, this Court recognized that truthful commercial speech is entitled to constitutional protection because it permits consumers to serve their own self-interests, which may be more important to them than "the day's most urgent political debate." 425 U.S. 748, 763 (1976). The Court also noted the public interest in consumers' decisions being "intelligent and well informed." *Id.* at 765. False information only frustrates these two constitutionally protected interests. As the Court has explained: "The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) (citation omitted). Only regulation of truthful information presents the possibility that the state is imposing paternalistic goals on consumers and seeking to manipulate consumer choice by keeping information from them. *See Bates v. State Bar of Fla.*, 433 U.S. 350, 375 (1977); *Virginia State Bd. of Pharmacy*, 425 U.S. at 769-70; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 497 (1996). Prohibiting false or misleading speech by businesses promotes informed consumer choice and ensures that consumers are not "kept in ignorance"—to borrow a phrase from *Virginia State Board of Pharmacy*, 425 U.S. at 769—by commercial speech itself.

Because the speech at issue is presumptively false, the inquiry performed in most commercial speech cases—whether the state regulation at issue is justified *despite* the barriers it creates to consumers receiving truthful information—is inapplicable here. Thus, if the California Attorney General had brought this case, surely the First Amendment would not shield Nike from liability for any factual representations that were

proven false. The same outcome follows here. The State of California, by prohibiting false or misleading commercial speech that *misinforms* consumers, seeks to serve the very interests identified in *Virginia State Board of Pharmacy* as worthy of constitutional protection.

A. Respondent's Suit Targets Specific Factual Assertions Directed at Consumers.

1. At least some of the speech identified in the complaint falls well outside the scope of Nike's First Amendment defense. This speech was marked by the indicia to which the Court has always looked in judging whether speech is commercial: It was directed to Nike customers, contained a promotional message, and was aimed at persuading consumers to buy its products. *See, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68 (1983). Moreover, Nike's statements contained a number of specific factual claims about its labor practices that were readily verifiable by Nike and are fully capable of being proven true or false.

One example is the December 1996 letter from Nike's Director of Sports *Marketing* to presidents and athletic directors of more than 200 colleges and universities. *Id.*, Exh. R. Nike maintains endorsement contracts with more than 200 colleges that agree to use—and thereby promote—Nike products. *Id.* at ¶14. Sports endorsement contracts are so important that they are the only marketing activity singled out for specific mention in Nike's annual reports year after year. *See* Nike, Inc., Annual Reports for the years 1997-2002, at Year in Review, available at www.nikebiz.com.

In the letter to the college and university officials, Nike made several specific claims about how its products are made

to support its broader assertion that working conditions at its overseas factories meet established, identifiable standards:

> First and foremost, wherever NIKE operates around the globe, it is guided by principles set forth in a code of conduct that binds its product subcontractors . . . [and] strictly prohibits child labor, and certifies compliance with applicable government regulations regarding minimum wage and overtime, as well as occupational health and safety, environmental regulations, worker insurance and equal opportunity provisions. . . .
>
> . . . [S]ome violations occur. However, we have been proud that *in all material respects the code of conduct is complied with.*

First Am. Compl., Exh. R (emphasis added).

The context in which these factual representations were made—a letter from Nike's marketing department to important Nike customers—indicates that Nike's purpose was to promote itself to customers, to persuade them to use Nike products. The recipients of the letter were not prominent figures in the debate about overseas labor practices. Rather, they were prominent Nike customers and an important component in Nike's promotional strategy. And Nike's Marketing Director was speaking to them as part of the company's effort to maintain and boost sales.

The complaint also cites a release entitled "Please, consider this. . . ." *Id.*, Exh. P. Although the complaint does not explain how Nike used this document, the title and language (*e.g.*, "we'd like to share our perspective with you")

show that it was intended for consumers. Among other things, the document states: "Nike pays on average, double the government-mandated minimum wage in the countries where our footwear is produced." A document making specific factual assertions for consumers to "consider" is necessarily intended to promote a commercial transaction.

Either of the above examples of allegedly false or misleading speech is enough to maintain this suit. Other allegedly false statements may be actionable as well, although they are harder to assess at this early stage in the litigation because Nike's use of the material and its intended audience is not apparent from the face of the complaint. *See, e.g., id.*, Exh. V at 549 (Pet. Lodg. at 220) (document entitled "Nike Production Primer," representing that average line-worker's wage in Nike's Indonesia factory was double government-mandated minimum, that workers in Nike factories receive subsidies for food and health care, and that they receive overtime pay and paid leave).

These publications were prepared by Nike as part of a carefully-planned, sustained campaign to appeal to customers concerned about Nike's overseas labor practices. At this threshold stage, the Court could reasonably infer (and later discovery may confirm) that they were prepared by Nike's marketing department and released and promoted by its press office in an effort to communicate directly with consumers. That is, Nike was not speaking merely to participate in a debate about fair labor practices around the world or the value of various worker benefits. It was speaking to promote and protect its corporate image, an image that has long been at the crux of its marketing campaign and its sales success. *See, e.g.*, Nike, Inc., 2002 Annual Report, Year in Review, available at

www.nikebiz.com ("In communicating with consumers, we focused on emotional expressions of the Nike personality.").

Nonetheless, the most appropriate course given the posture of this case is for the Court not to sort through these other statements. If the Court agrees that the letter from a Nike marketing director to college and university officials or the Nike release asking consumers to "consider this" is not subject to Nike's First Amendment defense, its jurisdiction is at an end.

2. The fact that Nike's product marketing strategy is focused on image marketing, rather than traditional product sales pitches, is of no constitutional significance. To be sure, many of the Court's commercial speech cases have involved statements about price, as in *Virginia State Board of Pharmacy*, or ingredients, as in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), or direct solicitation of clients, as in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), or *Edenfield v. Fane*, 507 U.S. 761 (1993). Nike, however, has consistently chosen not to focus its advertising on such features of its products but instead to focus on creating and maintaining a strong brand identity, which revolves around a swoosh and an image. Commercials showing Tiger Woods bouncing a ball on the end of a golf club, Pete Sampras stretching for a ball on the tennis court, or sweating athletes pushing themselves to "Just do it"—all are efforts to promote sales by associating Nike with an image that will attract consumers. These ads say nothing about price and nothing about the materials used to manufacture products; they make no direct pitch that the viewer buy Nike golf balls, shoes, or shirts. Rather, they ask consumers to buy into the Nike image in the hope that they will then buy Nike products. In Nike's words, "We are here to inspire and motivate the athlete in all of us and advocate the love of sports." First Am. Compl., Exh. A at 372 (Pet. Lodg. at 47).

Presumably, not even Nike would argue that its image advertising was protected by the First Amendment if, for example, the Federal Trade Commission could show that the golf equipment used in a Tiger Woods commercial was not Nike's. Yet its "labor friendly" campaign is not meaningfully distinguishable. Its value to Nike is its ability to entice consumers seeking labor-friendly products to purchase Nike apparel and equipment and to forestall and negate criticism that might threaten sales. Any suggestion that Nike touted its labor practices in full page advertisements in national newspapers (*id.*, Exh. FF) only because it wanted to participate in a debate about proper working conditions in Asia is disingenuous at best and subject to being proven or disproven at trial.

B. The First Amendment Does Not Protect False Marketing Statements Simply Because They Relate To Controversial Topics.

No one, least of all Nike, contends that labor practices do not affect consumer choice. *See Sourcing: Cheap v. Ethical*, J. Am. Chamber Com. in Hong Kong, Sept. 1, 1997 ("American consumers have shown that they are prepared to pay a few dollars more for garments made in decent working conditions. Companies are realizing that it costs less to implement a code of conduct than to regain consumer loyalty lost by bad publicity."). A study by Marymount University revealed that 78 percent of consumers would avoid stores that sell clothing made under "sweatshop" conditions, and 84 percent would pay five percent more for clothing the manufacturer guaranteed was not made under such conditions. K. Cottril, *Global Codes of Conduct*, J. Bus. Strategy, May 1, 1996; *see also* US Br. 28 ("In today's environment, the means used to produce goods, no less than the quality of the goods themselves, have profound significance for some consumers, who are willing to pay more

to achieve desirable environmental or social ends."). And a plethora of business publications warn apparel retailers that a positive image regarding labor practices is essential for maintaining customer loyalty and market share. M.M. Hossain, *Emerging Markets Database: The Debate on Labor Standards,* The Independent, April 2, 2000; M. Scott, *Can Consumers Change Corporations*?, Executive Female, May 15, 1996; *Sourcing:Cheap v. Ethical*, *supra*; N. Morris, *Saving The Brand Name*, MacClean's, Dec. 11, 1995, at 30. Thus, Nike has a market-driven, economic incentive to promote itself as labor-friendly.

Nike's own statements demonstrate that Nike was speaking for the purpose of influencing consumer purchasing decisions. For example, Nike's December 1996 letter in the *San Francisco Examiner* spoke directly to "shoppers." Nike stated that "consumers are savvy and want to know they support companies with good products and practices." It also stated that "during the shopping season, we encourage shoppers to remember" that Nike is a leader in improving factory conditions and to "consider" that Nike established the sports apparel industry's first code of conduct "to ensure our workers know and can exercise their rights." First Am. Compl., Exh. S.

That the subject of Nike's speech related to a matter of public interest—the issue of what conditions should apply to contracts for overseas production by American companies —does not affect the First Amendment analysis. Nike was speaking in the hope of inducing consumers to buy its products. The First Amendment presents no barrier to actions based on false factual statements in this context.

1. A connection to an issue of public interest does not make otherwise commercial speech noncommercial and, a

fortiori, does not immunize false speech from scrutiny. *Bolger*, 463 U.S. at 68 ("We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech."); *see Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475 (1989). For example, the commercial speech at issue in *Central Hudson* was made by a utility, about electricity regulation, during and because of a national debate on energy conservation. 447 U.S. at 561. Likewise, many of this Court's most important commercial speech cases have involved speech about controversial products or services. *See, e.g., Lorillard v. Reilly*, 533 U.S. 525 (2001) (cigarettes); *44 Liquormart*, 517 U.S. at 489 (alcohol); *Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986) (gambling); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 629-30 (1985) (legal representation in drunk driving cases and in product liability suits regarding Dalkon Shield); *Bolger*, 463 U.S. at 62 (contraceptives); *see also Virginia State Bd. of Pharmacy*, 425 U.S. at 764 (characterizing as "entirely 'commercial'" speech promoting artificial fur as alternative to extinction of fur-bearing animals and ad touting domestically produced product as preserving American jobs).

Thus, Nike's plea that the First Amendment protects its false statements because they addressed a matter of public concern runs counter to the foundations of this Court's commercial speech jurisprudence. Nike fails to appreciate that the protection afforded *accurate* commercial speech is based in part on the importance of that speech to the public. *Virginia State Bd. of Pharmacy*, 425 U.S. at 763-65. For this reason, the Court has rejected the notion that a "line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn." *Id.* at 765; *see also Bates*, 433 U.S. at 364 ("Advertising, though entirely commercial,

may often carry information of import to significant issues of the day."). Public concern about Nike's labor practices neither distinguishes this case from prior commercial speech cases nor justifies immunizing Nike's allegedly false marketing representations from judicial scrutiny.

In addition, to give full First Amendment protection to Nike's marketing speech merely because it appeals to consumers based on social or political preferences would require the Court to engage in difficult and unjustified line-drawing concerning a vast array of consumer choices. Many product characteristics that do not directly affect consumers are accepted bases for marketing and purchasing products. For example, federal law requires that products bearing the label "Made in USA" must in fact have been made in the United States. 62 Fed. Reg. 63756, 63767-71 (1997) (FTC policy under authority of 15 U.S.C. § 45). Consumers look for such labels based in part on a belief that U.S.-made products will be produced in compliance with labor-friendly wage, labor, or health and safety laws. Surely, consumer purchasing choices influenced by this label are no different from consumer choices influenced by whether a product is made according to the production characteristics touted in Nike's statements.

Similarly, a consumer's choice when buying an automobile may be influenced by concern about the environmental effect of vehicle emissions—for example, some people pay more for hybrid cars because they produce fewer emissions. Under Nike's theory, however, public debate over whether vehicle emissions increase global warming would warrant extending First Amendment protection to an auto manufacturer's false marketing claims about reduced emissions from its vehicles. Other examples of product claims regarding characteristics that do not bear directly on tangible product

characteristics, but unquestionably affect purchasing decisions, include "dolphin-free" tuna (tuna caught using nets that do not harm dolphins), "green" labels indicating products produced in ways that meet certain environmental standards, products bearing a "union label," and representations that products were not tested on animals.

The terms "public issue" and "controversy" have little meaning as tests for distinguishing between commercial and noncommercial speech because so much of what corporations do is the subject of public interest or debate. Accordingly, fully protecting speech about any business practice that became a subject of public concern would mean that the more controversial or potentially hazardous a company's products or practices (*e.g.*, cigarettes, pharmaceuticals), the greater license the company would have to make misrepresentations to the public. The Court should not countenance a theory under which the aspects of products or business about which consumers care most become those about which they are least entitled to receive accurate information.

2. There is no principled basis under the First Amendment for distinguishing regulation through private attorney general suits from regulation through actions brought by state attorneys general or other government agencies. Therefore, granting full First Amendment protection to speech that is related to controversy would sharply curtail the government's traditional police power to regulate business conduct. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (state may regulate conduct carried out by means of speech).

For example, to protect the public's investments, the Securities and Exchange Commission regulates speech by requiring and forbidding various corporate disclosures.

Suppose a company negligently misreported its earnings, based on accounting methods that were the subject of public controversy. Under Nike's theory, the company would be entitled to claim a First Amendment defense to a shareholder action.

To protect the health of consumers, the Food and Drug Administration regulates much of what drug companies say about their pharmaceutical products. Suppose a pharmaceutical company, in the debate over the efficacy of a certain cancer treatment, made representations about its cancer drug that were not supported by the scientific evidence. Under Nike's theory, the FDA might well be foreclosed from regulating such speech.

And as the Solicitor General points out, the government's regulatory power to enjoin fraud under the Federal Trade Commission Act, as well as under the numerous state laws modeled after the FTC Act, runs counter to Nike's theory in this case. US Br. 28.

Each of these regulatory agencies acts in areas of significant public interest. Invalidating such regulation would drastically limit the traditional sphere of government police power and open consumers to the misconduct that the police power is meant to prevent. For this reason, if the question presented here arose in an action by a governmental agency, the Solicitor General would undoubtedly support the respondent. *See* US Br. 20.

3. Finally, allowing this suit to go forward would not place companies at an impermissible disadvantage relative to their customers. When a member of the public or a competitor makes a false statement about Nike's practices, Nike can hold the speaker accountable, consistent with state libel laws and the First Amendment. Morever, to the extent that Nike believed

that this suit was brought to chill the exercise of its right to speak with regard to a matter of public concern and was without legal merit, Nike could have moved, within 60 days of service of the complaint, to strike the complaint under California's anti-SLAPP statute. *See* Cal. Code Civ. Proc. § 425.16. If successful, Nike would have been entitled to recover from Kasky its attorney fees and costs incurred in making the motion. *Id.* § 425.16(c).

Suits like this one brought under California Business and Professions Code § 17200 make the playing field more level, by holding Nike accountable for its false speech. Such a result is particularly appropriate because Nike has an inherent advantage, as it can claim (and has claimed) first-hand access to facts about its 800 overseas factories that its critics can never attain. Assuming that the *New York Times v. Sullivan* standard does not apply in this lawsuit, *see* 376 U.S. 254, 279-80 (1964), less stringent speech protection would be justified by the fact that Nike's speech has a commercial purpose, is robust, and is verifiable by Nike. Because Nike's speech was intended to influence sales of its products, the First Amendment presents no impediment to holding Nike responsible for the accuracy of its factual assertions.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the California Supreme Court and remand the case for further proceedings.

Respectfully submitted,

Alan B. Morrison
Counsel of Record
Allison M. Zieve
Marka Peterson
Scott L. Nelson
David C. Vladeck
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Amicus Curiae
Public Citizen

April 2003